# Certificate and Transcript of Record

## Supreme Court of the United States

OCTOBER TERM, 1926

## No. 898

HARRY R. ALSTON

*vs.*

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED FEBR[illegible]RY 14, 1927

(32,465)

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[fol. a]

# IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

SEPTEMBER TERM, A. D. 1926

No. 7122

HARRY R. ALSTON, Plaintiff in Error,

v.

UNITED STATES OF AMERICA, Defendant in Error

In Error to the District Court of the United States for the Southern District of Iowa

Messrs. John B. Boddie and Frans E. Lindquist for plaintiff in error.

Hon. Ross R. Mowry, United States Attorney, Mr. Ray C. Fountain, Assistant United States Attorney, and Mr. Frank F. Wilson, Assistant United States Attorney, for defendant in error.

Before Stone, Van Valkenburgh, and Booth, Circuit Judges

## STATEMENT OF CASE

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on an appeal now pending before it discloses the following:

On the second day of December, 1924, an indictment was returned charging Harry R. Alston with a violation of the Act of December 17, 1914 (38 Stat. 785) as amended by the Acts of February 24, 1919 (40 Stat. 1057, 1130, sec. 1006) and of November 23, 1921 (42 Stat. 227, 298, sec. 1005) in that he had purchased morphine (a derivative of opium) and cocaine (a derivative of coco leaves) in packages not bearing and having affixed appropriate tax paid stamps as required by the Act as thus amended.

To that indictment, Alston entered a plea of guilty upon which he was adjudged guilty and sentenced to imprisonment for a term of four years.

Within due time thereafter, Alston sued out a writ of [fol. b] error from the above judgment. Among the Assignments of Error are the following:

"Fourth

That the said Acts of February 24, 1919 and November 23, 1921, respectively, in so far as the said Acts attempt to make it a crime to "purchase" narcotic drugs, is violative of the Tenth Amendment to The Constitution of the United States, in that such power is not delegated to the United States by the Constitution of the United States, nor prohibited by its [it] to the States, but such power is reserved to the States respectively and to the people.

Fifth

That the "purchaser" of such narcotic drugs referred to in said Acts of February 24, 1919 and November 23, 1921, respectively, is not required to register and pay a special tax, as required by the Act of December 17, 1914, upon every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, the said Acts of February 24, 1919 and November 23, 1921, so far as the same pertains to "purchaser" of such drugs, cannot be upheld as a revenue measure."

Plaintiff in error presents to this court the contention that the Congress was without Constitutional authority to enact the above legislation making the purchase of the designated narcotics unlawful. The basis of this contention is that such a prohibition is an exercise of police power; that such character of power is vested in the several States exclusively by the Constitution of the United States; and that the above enactments cannot be sustained as an exercise of the revenue power of the National Government because they are not revenue measures but are purely police measures.

This court has, in numerous cases heretofore, proceeded upon the assumption that the validity of the above Congres-

sional enactments had been sustained by the Supreme Court. However, in the recent case of United States v. Daugherty (269 U. S. 360) the court makes use of the language following:

"The constitutionality of the Anti-Narcotic Act, touching which this Court so sharply divided in United States v. Doremus, 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in Hammer v. Dagenhart, 247 U. S. 251; Child Labor Tax Case, 259 U. S. 20; Hill v. Wallace, 259 U. S. 44, 67; and Linder v. United States, 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

In view of the above expression of the Supreme Court, this court is doubtful of its duty and desires the instruction of the Supreme Court upon the following question, a decision of which is indispensable to a determination of this case [fol. c] before it and to the proper discharge of its duties herein.

QUESTION CERTIFIED

Question I. Are the Acts of December 17, 1914 (38 Stat. 785), of February 24, 1919 (40 Stat. 1057, 1130, sec. 1006) and of November 23, 1921 (42 Stat. 227, 298, sec. 1005), declaring the purchase of the designated narcotics unlawful under the circumstances set forth in such statutes, valid enactments as being within the power delegated to the Congress by the Constitution of the United States?

[fol. c] Kimbrough Stone, United States Circuit Judge. Arba S. Van Valkenburgh, United States Circuit Judge. Wilbur S. Booth, United States Circuit Judge, being the judges who sat in the Circuit Court of Appeals on the hearing of the case.

[fols. d & e] Clerk's certificate to foregoing paper omitted in printing.

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[fol. f] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on Ross R. Mowry, filed June 5,1925, omitted in printing.

[fol. 2] In United States Circuit Court of Appeals

Writ of Error and Return

United States of America, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Southern District of Iowa, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, at the December Term, 1924, thereof, between United States of America, Plaintiff, vs. Harry R. Alston, Defendant, Criminal, No. —, a manifest error hath happened, to the great damage of the said Harry R. Alston, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 26th day of July, 1925, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 26th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Issued at office in the City of Des Moines with the seal of the District Court of the United States for the Southern District of Iowa.

Dated as aforesaid.

N. F. Reed, Clerk District Court United States, Southern District of Iowa, by —— ——, Deputy. (Seal.)

Allowed by Wm. S. Kenyon, Circuit Judge.

[fols. 3 & 4] RETURN TO WRIT

UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said Court, at office in the City of Des Moines, this 24th day of July A. D. 1925.

N. F. Reed, Clerk of said Court. (Seal.)

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[fol. 5] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA

INDICTMENT—Filed December 2, 1924

The Grand Jurors of the United States of America, duly empaneled, sworn and charged to inquire in and for the body of the Southern District of Iowa, at a term of the United States District Court, begun and held at Des Moines, in said division and district, on the 25th day of November, A. D. 1924, in the name and by the authority of the United States of America, upon their oaths do find and present:

Count One

That one Harry R. Alston, on or about the 24th day of July in the year of our Lord One Thousand Nine Hundred and Twenty-Four, in the city of Des Moines, County of Polk and State of Iowa, in the Central Division of the Southern District of Iowa, and within the jurisdiction of this Court, did unlawfully, wilfully and feloniously purchase opium, and a derivative and preparation thereof, to-wit, morphine, from a person or persons who to this grand jury was unknown, said morphine being in and from certain packages which said packages were not then and there the original stamped packages containing said mor-

[fol. 6] phine, and which said packages did not bear and have affixed thereto appropriate tax paid stamps as required by the Act of Congress approved December 17, 1914, as amended, and known as the Harrison Drug Act, said purchase not coming within any of the exceptions provided in said act as amended, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Two

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present: That the said Harry R. Alston, on or about the 6th day of October in the year of our Lord One Thousand Nine Hundred and Twenty-Four, in the City of Des Moines, County of Polk and State of Iowa, in the Central Division of the Southern District of Iowa, and within the jurisdiction of this Court, did unlawfully, wilfully and feloniously purchase opium, and a derivative and preparation thereof, to-wit, morphine, from a person or persons who to this grand jury are unknown, said morphine being in and from certain packages which said packages were not then and there the original stamped packages containing said morphine, and which said packages did not bear and have affixed thereto appropriate tax paid stamps as required by the Act of Congress approved December 17, 1914, as amended, and known as the Harrison Drug Act, said purchase not coming within any of the exceptions provided in said act as amended, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Three

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present: That one Harry R. Alston, on or about the 6th day of October in the year of our Lord One Thousand Nine Hundred and Twenty-Four, in the city of Des Moines, County of Polk and State of Iowa, in [fol. 7] the Central Division of the Southern District of Iowa, and within the jurisdiction of this Court, did unlawfully, wilfully and feloniously purchase coco leaves, and a

derivative and preparation thereof, to-wit, cocaine, from a person or persons who to this grand jury are unknown, said cocaine being in and from certain packages which said packages were not then and there the original stamped packages containing said morphine, and which said packages did not bear and have affixed thereto appropriate tax paid stamps as required by the Act of Congress approved December 17, 1914, as amended, and known as the Harrison Drug Act, said purchase not coming within any of the exceptions provided in said act as amended, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

(Signed) Ray C. Fountain, Assistant United States Attorney.

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[fol. 8] IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES OF ARRAIGNMENT AND PLEA—December 2, 1924

On this day comes the grand jury into open court and by their foreman return a true bill of indictment against Harry R. Alston, charging him with having violated an Act of Congress approved December 17th, 1914, to-wit: Harrison Drug Act which indictment is filed in open court and in the presence of the grand jury. On motion of F. F. Wilson, Asst. U. S. Attorney, it is ordered that the defendant be now arraigned whereupon he answers that his true name is Harry R. Alston and pleads guilty to the charges contained in the indictment filed herein. It is ordered that cause be passed for sentence.

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[fol. 9] IN UNITED STATES DISTRICT COURT

JUDGMENT—December 29, 1924

On this day this cause comes on for judgment upon the plea of guilty heretofore entered, the plaintiff appearing by Ray C. Fountain, Asst. U. S. Attorney, and the defend-

ant appearing in his own proper person. Thereupon it is inquired of the defendant what if anything he has to say why the judgment of the Court should not now be pronounced, and he having said what he desired to say and having nothing further to say, it is ordered and adjudged that the defendant, Harry R. Alston be imprisoned in the United States penitentiary at Leavenworth, Kansas, for a term of four years under Count one of the indictment filed herein; it is further ordered and adjudged that the defendant, Harry R. Alston, be imprisoned in the United States penitentiary at Leavenworth, Kansas, for a term of four years under Count Two of the indictment filed herein; it is further ordered and adjudged that the defendant, Harry R. Alston, be imprisoned in the United States penitentiary at Leavenworth, Kansas, for a term of four years under Count Three of the indictment filed herein; it is further ordered that the sentences imposed under Counts Two and Three shall run concurrently with the sentence imposed under Count One of the indictment filed herein. It is further ordered and adjudged that the defendant, Harry [fol. 10] R. Alston pay the costs of this prosecution taxed at $—, under Count One of the indictment filed herein, said costs to stand on execution until the further order of the Court.

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[fol. 11] IN UNITED STATES DISTRICT COURT

PETITION FOR A WRIT OF ERROR—Filed June 4, 1925

To the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

And now comes Harry R. Alston, the defendant in the above entitled cause, and respectfully represents and shows to Your Honors that heretofore, on the 2nd day of December, A. D. 1924, the Grand Jurors of the United States within and for the Central Division of the Southern District of Iowa, returned into said United States District Court, a certain indictment, in three counts, against the above named defendant, charging him with pretended violations of the Harrison Drug Act, to which said defendant entered a plea of guilty as charged.

That thereafter, on the 29th day of December, A. D. 1924, upon such plea of guilty, the defendant was sentenced to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for a term of four years, under count one of said indictment, for a term of four years, under the second count of said indictment, and for a term of four years under the third count of said indictment, and that the sentences imposed under counts two and three should run [fol. 12] concurrently with the sentence imposed under count one of said indictment, and that the defendant pay the costs of such prosecution, to be collected on execution.

That the said defendant feels himself aggrieved by the said judgment and sentence aforesaid, all of which is more fully shown by the Assignment of Errors filed herewith and made a part of this petition.

Wherefore the defendant (plaintiff in error) prays that a writ of error may issue from the United States Circuit Court of Appeals for the Eighth Circuit, to the United States District Court, for the Southern District of Iowa; that said writ of error may be made a supersedeas, and that the plaintiff in error may be released on bail, in such amount as may be fixed by Your Honors, pending the final hearing and disposition of said writ of error, and that a Citation may be issued, directed to the defendant in error, returnable as required by law and the rules of this court.

(Signed) John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

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[fol. 13] In United States District Court

Assignments of Error—Filed June 4, 1925

And now comes Harry P. Alston, Plaintiff in Error, the defendant in the above entitled cause, and says that in connection with his Petition for a Writ of Error, in the indictment, record, proceedings and final judgment, error has intervened to his prejudice, as follows, to-wit:

First

That the judgment and sentence, imposed by the District Court, in the above entitled cause, on the 29th day of De-

cember, A. D. 1924, upon his plea of guilty as charged in three counts of the indictment, that he be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for a term of four years, under count one of the indictment; for a term of four years under count two of the indictment and for a term of four years under count three of the said indictment, the sentences imposed under counts two and three to run concurrently with the sentence imposed under count one, and to pay the costs of the prosecution, to be collected on execution, is contrary to and in violation of the Fifth Amendment to the Constitution of the United States, in that he is deprived of his liberty without [fol. 14] due process of law, and the District Court had no power or jurisdiction to impose said judgment and sentence, for the reasons following, to-wit:

(a) That said counts one, two and three of said indictment are based upon section 1 of Acts of February 24, 1919, and November 23, 1921, being 40 Stat. 1130 and 42 Stat. 299, respectively, making it unlawful for any person to "purchase" any opium, or coco leaves, or any compound, manufacture, salt, derivative, or preparation thereof, except in original stamped package or from the original stamped package, such "purchase" not being prohibited by the original Act of December 17, 1914, (commonly known as the Harrison Anti-Narcotic Act) 38 Stat. 785, but that the said Acts of February 24, 1919 and November 23, 1921, respectively, attempting to make it unlawful to "Purchase" any of such drugs, fixes no penalty for violation thereof.

(b) That the original Act of December 17, 1914, 38 Stat. 785, fixing the punishment for violations of said Act, cannot apply to the "purchase" of such drugs, first attempted to be made unlawful by the said Acts of February 24, 1919 and November 23, 1921, as aforesaid.

(c) That by reason of the failure of Congress to fix any punishment for the "purchase" of such drugs, the District Court had no power or jurisdiction to impose the judgment and sentence aforesaid upon the defendant, and the same is illegal, null and void, for want of jurisdiction.

Wherefore Plaintiff in Error prays that said judgment and sentence be set aside and said cause be reversed, without remanding it for a new trial.

(Signed) John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

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[fol. 15] In United States District Court

Præcipe for Transcript of Record—Filed June 5, 1925

To the Hon. N. F. Reed, Clerk:

In preparing the Transcript of Record on writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, you are respectfully requested to include the following:

1. Copy of the Indictment filed Dec. 2nd, 1924.
2. Plea of guilty, December 2nd, 1924.
3. Sentence, December 29th, 1924.
4. Petition for a Writ of Error.
5. Assignment of Errors.
6. Citation with admission of service thereof.
7. Original Writ of Error.

Respectfully, (Signed) John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

Service of the foregoing Præcipe is hereby accepted this 5th day of June, 1925.

(Signed) Ross R. Mowry, United States Attorney, Attorney for Defendant in Error. Ray C. Fountain, Assistant U. S. Attorney.

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[fol. 16] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 17] Appearances of counsel omitted in printing.

[fol. 18] In United States Circuit Court of Appeals for the Eighth Circuit

No. 7122

Harry R. Alston, Plaintiff in Error,

vs.

The United States of America, Defendant in Error

Motion for Leave to File First Amended Assignments of Error—Filed August 7, 1925

Comes now the Plaintiff in Error in the above entitled cause, and respectfully moves this Honorable Court to grant him permission to file his First Amended Assignment of Errors, in order that the questions of law involved in this case may be more fully presented and the rights of the Plaintiff in Error protected, so as to read as follows, to-wit:

First

That said counts one, two and three of said indictment are based on Section 1 of Acts of February 24, 1919, and November 23, 1921, being 40 Stat. 1130 and 42 Stat. 299, respectively, making it unlawful for any person to "purchase" any opium, or coco leaves, or any compound, manufacture, salt, derivative, or preparation thereof, except in original stamped package or from the original stamped package, such "purchase" not being prohibited by the original Act of December 17, 1914, (commonly known as the Harrison Anti-Narcotic Act) 38 Stat. 785, but that the said Acts of February 24, 1919 and November 23, 1921, respectively, attempting to *to* make it unlawful to "purchase" any such drugs, fixes no penalty for violation thereof.

Second

That the original Act of December 17, 1914, 38 Stat. 785, fixing the punishment for violations of said Act, cannot apply to the "purchase" of such drugs, first attempted to be made unlawful by the said Acts of February 24, 1919 and November 23, 1921, aforesaid.

### Third

That the first, second and third counts of said indictment, to which the Plaintiff in Error entered a plea of guilty as charged, do not state facts sufficient to constitute any crime against the laws of the United States of which the United States District Court for the Southern District of Iowa, Central Division, has any jurisdiction, and is violative of the Sixth Amendment to the Constitution of the United States, in that the said counts do not inform the Plaintiff in Error of the nature and cause of accusation against him.

### Fourth

That the said Acts of February 24, 1919 and November 23, 1921, respectively, in so far as the said Acts attempt to make it a crime to "purchase" narcotic drugs, is viola- [fol. 19] tive of the Tenth Amendment to the Constitution of the United States, in that such power is not delegated to the United States by the Constitution of the United States, nor prohibited by it to the States, but such power is reserved to the States respectively and to the people.

### Fifth

That the *the* "purchaser" of such narcotic drugs referred to in said Acts of February 24, 1919 and November 23, 1921, respectively, is not required to register and pay a special tax, as required by the Act of December 17, 1914, upon every person who produces, imports, manufactures, compounds deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, the said Acts of February 24, 1919 and November 23, 1921, so far as the same pertains to "purchaser" of such drugs, cannot be upheld as a revenue measure.

### Sixth

That by reason of the failure of Congress to fix any punishment for the "purchase" of such drugs, upon the "purchaser", the United States District Court for the Southern District of Iowa, Central Division, had no power or jurisdiction to impose the judgment and sentence upon the Plain-

tiff in Error that he be confined in the United States Penitentiary at Leavenworth, Kansas, for a term of four years under count one of the indictment, for a term of four years under count two of the indictment and for a term of four years under count three of said indictment, such sentences to run concurrently, and such sentences are null and void, for want of jurisdiction, and the Plaintiff in Error is detained, restrained and deprived of his liberty without due process of law, contrary to and in violation of the Fifth Amendment to the Constitution of the United States.

John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

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[fol. 20] In United States Circuit Court of Appeals

[Title omitted]

Motion to Reduce Amount of Bond—Filed August 15, 1925

Comes now the above named Plaintiff in Error, by John B. Boddie and Frans E. Lindquist, his attorneys, and respectfully moves this Honorable Court to reduce the amount of the appearance bond of the plaintiff in error, pending the hearing and final determination of this case, in order that said plaintiff in error may be released from the United States Penitentiary at Leavenworth, Kansas, for the reasons following, to-wit:

1. That after the issuance of the writ of error and the service of the citation, the plaintiff in error presented to the Honorable Wm. S. Kenyon, one of the Judges of this Honorable Court, his Motion to be admitted to bail, on which the said Judge made the following order, "Bond fixed at $5,000.00 St. Paul June 16, 1925. Wm. S. Kenyon, Judge," which said Motion is now filed in the office of the Clerk of the United States District Court at Des Moines, Iowa.

2. That the plaintiff in error has been unable to furnish a bond in said sum of $5,000.00.

3. That by reason of the grounds alleged in the Motion for leave to file First Amended Assignment of Errors, which are referred to and made a part of this motion, the plaintiff in error is now detained, restrained and deprived of his liberty, in the said United States Penitentiary, in violation of the Fifth Amendment to the Constitution of the United States, without due process of law.

4. That said order that the plaintiff in error be required to enter into an appearance bond in the sum of $5,000.00 is excessive and in violation of the Eighth Amendment to the Constitution of the United States.

John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

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[fol. 21] In United States Circuit Court of Appeals

[Title omitted]

Resistance to Motion to Reduce Amount of Bond—Filed August 17, 1925

Comes now the United States of America, the Defendant in Error in the Above entitled cause, by Ross R. Mowry, United States Attorney for the Southern District of Iowa, and as and for resistance to the motion of the Plaintiff in Error for an order reducing the amount of the appearance bond of the plaintiff in error pending the hearing and final determination of this case, respectfully states to the Court:

1. That the Plaintiff in Error in this cause was duly indicted by the Grand Jury in the Central Division of the Southern District of Iowa and said indictment was formally returned into Court by the grand jury which voted the same.

2. That the crime charged in the indictment filed against this Plaintiff in Error in the United States District Court was a serious offense against the laws of the United States.

3. That this Plaintiff in Error entered his Plea of Guilty to the offense charged in the indictment returned against him in United States District Court, and the Court, after hearing all the facts in the matter and giving the defendant an opportunity to be heard imposed a sentence of four (4) years in the penitentiary.

4. That the bond of Five Thousand ($5,000.00) Dollars as fixed in this appeal is not excessive and is no more than an adequate bond in view of the charge on which this Plaintiff in Error was convicted in District Court.

It is therefore asked that the Motion of the Plaintiff in Error be denied.

Ross R. Mowry, United States Attorney for the Southern District of Iowa and Attorney for Defendant in Error.

[File endorsement omitted.]

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[fol. 22] In United States Circuit Court of Appeals

[Title omitted]

Notice of Hearing of Motions—Filed August 18, 1925

To the Honorable Ross R. Mowry, United States Attorney and Attorney for the Defendant in Error:

You are hereby notified that the Plaintiff in Error will, on Monday, the 17th day of August, 1925, at the hour of ten o'clock A. M., submit to the Honorable the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St Louis, Missouri, the following motions, to-wit:

1. Motion for leave to file First Amended Assignment of Errors.

2. Motion to reduce amount of bond.

Respectfully, John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

Copies of the foregoing Motion for leave to file First Amended Assignment of Errors, Motion to reduce amount

of bond, and of this Notice, admitted, this 14th day of August, 1925.

Ross R. Mowry, United States Attorney, Attorney for Defendant in Error, by ——— ———, Assistant U. S. Attorney.

[File endorsement omitted.]

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[fol. 23] In United States Circuit Court of Appeals

[Title omitted]

Order Granting Leave to File First Amended Assignments of Error—August 24, 1925

This cause came on to be heard on the notice and motion for leave to file first amended assignment of errors, and there being no objections interposed. It is now here ordered by this Court that leave be, and is hereby, granted to plaintiff in error to file his first amended assignment of errors.

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[fol. 24] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Motion to Reduce Amount of Bond—August 24, 1925

This cause came on to be heard on the notice and motion of the plaintiff in error to reduce the amount of bond required of the plaintiff in error pending the hearing and final determination of this cause in this Court, in order to release the plaintiff in error from the United States Penitentiary at Leavenworth, Kansas, and upon the resistance to said motion filed in behalf of defendant in error.

Upon consideration of said motion and response thereto, It is now here ordered that the motion to reduce the amount of bond heretofore fixed at Five Thousand ($5,000.00) Dollars by one of the Judges of this Court be, and the same is hereby, denied.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION TO SUBMIT CASE ON TYPEWRITTEN RECORD AND BRIEFS —Filed September 12, 1925

Now comes the above named Harry R. Alston, by his Attorneys and respectfully represents and shows to this Honorable Court, that by reason of his poverty, he has been unable to pay his attorneys, John B. Boddie and Frans E. Lindquist, any portion of their fees for prosecuting this cause on a writ of error, and that by reason of his poverty, he is unable to pay the cost and expenses of printing the Transcript of Record and Briefs in the above entitled cause.

Said Harry R. Alston says that he has a just and meritorious cause, and verily believes that the judgment of the United States District Court should be reversed, without remanding, for the reasons specifically set forth in his First Amended Assignments of Error.

Wherefore the Plaintiff in Error prays that he may be allowed to prosecute this case as a poor person.

John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

*Duly sworn to by Harry R. Alston. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 26] Report of Assistant United States Attorney as to Ability of Plaintiff in Error to Pay Court Costs, etc.—Filed October 12, 1925

Department of Justice, Office of United States Attorney, Southern District of Iowa

October 9, 1925.

Hon. E. E. Koch, Clerk Circuit Court of Appeals, St. Louis, Missouri.

Dear Sir:

Re Harry R. Alston vs. U. S., No. 7122

The only information I have been able to secure concerning the above Harry R. Alston is that he formerly worked as porter for the Chicago Great Western Railroad and that he made his home in Kansas City. He has no property in this District so far as I am able to learn, and I have no doubt but that he is unable to pay the costs for the printing of the transcript of record in his case and for the printing of the briefs in the same.

Yours very truly, Ray C. Fountain, Asst. U. S. Atty.

RCF:WC.

[File endorsement omitted.]

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[fol. 27] In United States Circuit Court of Appeals

[Title omitted]

Order Granting Leave to Submit on Typewritten Record and Briefs—November 3, 1925

This cause is called to the attention of the Court on the motion and affidavit of plaintiff in error for leave to prosecute the same as a poor person for the reason that he is unable to pay the cost and expenses of printing the transcript of the record and briefs.

On Consideration of said motion and affidavit and the report of the Assistant United States Attorney for the Southern District of Iowa as to the ability of plaintiff in error to pay Court costs, etc., It is ordered by this Court that the plaintiff in error be, and he is hereby, granted leave to have his writ of error heard and determined by this Court on the typewritten transcript of the record from said District Court, and upon typewritten briefs in his behalf, five clear typewritten copies of the brief to be filed with the Clerk of this Court within the time provided by the rules.

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[fol. 28] Minute Entry of Submission of Cause January 21, 1926, omitted in printing

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[fol. 29] In United States Circuit Court of Appeals

[Title omitted]

Order to Certify Question to Supreme Court U. S.—November 15, 1926

A certain question having arisen on the record in this cause upon which this Court desires the instruction of the Supreme Court of the United States as provided by law, and a certificate of such question having been prepared and duly signed, It is now here ordered by this Court that such certificate be filed and entered of record in this Court, and that the original thereof be duly certified by the Clerk of this Court and that it be by him duly transmitted to the Supreme Court of the United States for its action thereon.

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[fols. 30-32] Certificate omitted; printed side page 1 ante.

[fol. 33] In United States Circuit Court of Appeals

[Title omitted]

Application for Reduction of Bond and Release Pending a Final Decision

Comes now the above named Plaintiff in Error and respectfully represents and shows to this Honorable Court:

First. That on the 2nd day of December, 1924, in the District Court of the United States at Des Moines, Iowa, he entered a plea of guilty as charged in the first, second, and third courts of the indictment, and was thereafter on the 29th day of December, 1924, sentenced to imprisonment in the United States Penitentiary at Leavenworth, Kansas, for a term of four years under count one: four years under count two, and four years under count three, the sentences imposed under counts two and three to run concurrently with the sentence under the first count and committed accordingly.

Second. That thereafter on the — day of May, 1925 and within six months the said Harry R. Alston sued out a writ of error from this Honorable Court, and a citation was duly issued, served on the United States Attorney and filed.

Third. That thereafter upon his application the Plaintiff in Error was admitted to bail in the sum of $5,000.00 and required to enter into a good and sufficient bond, with good and sufficient sureties, but that by reason of poverty, he was unable to furnish such bond.

Fourth. That thereafter, in due course, the said cause was submitted on briefs, and taken under advisement by [fol. 34] this Honorable Court, the questions of law in issue being whether the Plaintiff in Error can be punished for purchasing narcotic drugs, there being no penalty attached as to the purchaser, and whether the Harrison Act is not unconstitutional and in violation of the Tenth Amendment to Constitution of the United States, not being within the power delegated to the Congress by the Constitution of the United States, so far as the purchaser is concerned.

Fifth. That thereafter on the — day of November 1926, this Honorable Court, after a careful consideration of the case, certified the following questions to the Supreme Court of the United States:

"Are the Acts of December 17, 1914, (36 Stat. 785) of February 24, 1919, (40 Stat. 1057, 1130, Sec. 1006) and of November 23, 1921 (42 Stat. 227, 298 Sec 1005), declaring the purchase of the designated narcotics unlawful under the circumstances set forth in such statutes, valid inactments, as being within the power delegated to the Congress by the Constitution of the United States?"

Sixth. That the said certified question has been transmitted to the Supreme Court of the United States, and will not be answered until after the filing of the briefs, and oral arguments, respectively, during all of which time no final decision can be made by this Honorable Court, and the Plaintiff in Error will not be released on parole, although he has served more than one-third of the said sentence.

Seventh. That unless the Plaintiff in Error be released on bail, pending the final determination of this cause, he will be compelled to remain in said United States Penitentiary, although this Honorable Court will upon receipt of an answer in the negative, from the Supreme Court of the United States, hold that no crime has been committed and that the Congress is without jurisdiction to punish the purchaser of such narcotic drugs, and that, by reason thereof the Plaintiff in Error has during all of said period of time [fol. 35] been deprived of his liberty without due process of law contrary to and in violation of the Fifth Amendment to the Constitution of the United States, and he has redress, or remedy at law for damages or otherwise, by reason of having been so deprived of his liberty.

Eighth. That if, on the other hand, the judgment and sentence of four years be affirmed and the said Harry R. Alston is at liberty on bail, he will, at once, return to said United States Penitentiary at Leavenworth, Kansas, at his own cost and expense to serve the remainder of his said sentence, with allowance of good conduct, or until released on parole, and the United States of America will suffer no injuries by reason of having released him on bail.

Ninth. That by reason of poverty, said Harry R. Alston has been unable to furnish a good and sufficient bond with good and sufficient sureties capable of qua*l*fying as such sureties, and has been unable to pay his attorneys for services rendered and to be rendered in the prosecution of this cause, and he verily believes that he will be unable to obtain sureties on such bond, who can qualify.

Tenth. That in order that said Harry R. Alston may obtain the benefit of a successful prosecution of this writ of error and in equity and justice, the said Harry R. Alston should be released from said United States Penitentiary upon signing his own recognizance, without additional sureties.

Wherefore Plaintiff in Error prays that his bond be reduced, and that he may be released on bond pending the hearing and final determination of this cause, and for all proper relief.

John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

[fol. 36] *Duly sworn to by Harry R. Alston. Jurat omitted in printing.*

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In United States Circuit Court of Appeals

Notice of Hearing—Filed December 15, 1926

To the United States Attorney for the Southern District of Iowa:

You are hereby notified that the foregoing application will be presented to the Honorable the United States Circ*i*ut Court of Appeals for the Eighth Circ*i*ut, at the City of St. Louis, Missouri, on the 16th day of December, 1926, at 9:30 o'clock A. M.

Respectfully, John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

I hereby certify that at the City of St. Paul, Minnesota, on the 13th day of December, 1926, I mailed a copy of the

foregoing application and motion to The United States Attorney, Des Monies, Iowa.

Frans E. Lindquist, Attorney for Plaintiff in Error.

[File endorsement omitted.]

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[fol. 37] In United States Circuit Court of Appeals

[Title omitted]

Resistance to Application for Reduction of Bond—Filed December 16, 1926

Comes now the above named Defendant in Error and in resistance to the Plaintiff in Error's application for reduction of bond, respectfully represents and shows to this Honorable Court:

First. That the Honorable Wm. S. Kenyon, Judge of the United States Circuit Court of Appeals, Eighth Circuit, on the 16th day of June, A. D. 1925, at St. Paul, Minnesota, fixed the Plaintiff in Error's bond at $5,000.00, which is entirely just and of an amount commensurate with the facts in this case.

Second. That the above named Plaintiff in Error had, before the conviction in the above entitled cause, been previously convicted of violating the Harrison Drug Act and merits no charity from this Court.

Third. That Count One of the Indictment charges an offense on the 24th day of July, 1924, and Counts Two and Three charge offenses on the 6th day of October, 1924. These facts in addition to the previous record of the defendant shows that he has absolutely no regard for the law, and that his representation that he would appear voluntarily if released upon his own recognizance, if required, could not be relied upon whatsoever.

Fourth. That while the Plaintiff in Error plead guilty to Counts charging the unlawful purchase, the facts in the case disclosed circumstances tending to strongly indicate

that the Plaintiff in Error was engaged in the business of selling narcotics.

[fol. 38] Wherefore the United States of America, the Defendant in Error, respectfully prays that the Plaintiff in Error's application for reduction of bond be denied, and that the amount of bail heretofore fixed by the Honorable Wm. S. Kenyon, to-wit, Bail in the sum of $5,000.00, stand.

Ray C. Fountain, Assistant United States Attorney.

[File endorsement omitted.]

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[fol. 39] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Application for Reduction of Bond, etc.—January 31, 1927

In this cause counsel for the plaintiff in error filed an application for reduction of bond and release pending a final decision by this Court, and counsel for defendant in error filed a resistance to said application.

This application and resistance having been called to the attention of the Court, It is, after due consideration, now here ordered that the application for reduction of bond and release pending the final decision by this Court be, and the same is hereby, denied.

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[fol. 40] In Supreme Court of the United States

Order That Entire Record be Sent up—March 7, 1927; Filed in U. S. C. C. A. March 11, 1927

Motion for leave to proceed further in this cause in forma pauperis is granted. The case having been brought into this court on the certificate of the judges of the United States Circuit Court of Appeals for the Eighth Circuit, the Court now orders that the whole record herein be sent up to this

Court and directs the Clerk that the printing herein shall not be done until the complete record is received. The application of Alston, the plaintiff in error in the Circuit Court of Appeals, asking that the case be advanced, is granted and the case set for hearing April 11, 1927, after the cases heretofore assigned for that day.

The costs already incurred herein, by direction of the Court, as well as the costs of printing shall be paid by the Clerk from the special fund in his custody as provided in the order of October 29, 1926.

A true copy. Test:
Wm. R. Stansbury, Clerk of the Supreme Court of the United States. (Seal.)

[File endorsement omitted.]

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[fol. 41] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 42] [File endorsement omitted.]

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Endorsed on cover: File No. 32,465. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 898. Harry R. Alston vs. The United States of America. (Certificate.) Filed February 14th, 1927. File No. 32,465.